Nos. 87-1622, 87-1697, and 87-1715

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

PHILIP BRENDALE, STANLEY WILKINSON,
COUNTY OF YAKIMA, et al.,

Petitioners,

v.

CONFEDERATED TRIBES AND BANDS
OF THE YAKIMA INDIAN NATION, et al.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE CITY OF GREEN BAY, WISCONSIN, THE TOWNS OF HOBART AND ONEIDA, WISCONSIN, AND THE COUNTIES OF BROWN AND OUTAGAMIE, WISCONSIN AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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September 3, 1988

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Ninth Circuit erred by effectively reversing the presumption applied by this Court in Montana v. United States that Indian tribes have been implicitly divested of their sovereignty to regulate non-member conduct on non-member fee land to a presumption that an Indian tribe has authority to regulate fee land owned by non-members on a "checkerboard" reservation.

2. Whether an Indian tribe may regulate the use of land lying within its original reservation boundaries but allotted and later fee patented -- notwithstanding the land's loss of Indian character and the long-standing and unquestioned exercise of regulatory jurisdiction by local governments over such land.

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INTEREST OF AMICI CURIAE

The City of Green Bay, Wisconsin, the towns of Hobart and Oneida, Wisconsin and the Wisconsin counties of Brown and

Outagamie (collectively the "Wisconsin local governments") have a substantial and immediate interest in these cases. The United States Court of Appeals for the Ninth Circuit's apparent reversal of the presumption that Indian tribes have been implicitly divested of their sovereignty to regulate non-member conduct on non-member fee land[1] presents important questions concerning the Wisconsin local governments' authority to regulate fee land lying within their boundaries.

Included within the boundaries of the Wisconsin local governments are all 65,650 acres of land set apart by treaty for the First Christian and Orchard Parties of the Oneida Indians of Wisconsin (the "Oneidas"). A brief statement of the circumstances under which that land was set

[1] See Montana v. United States, 450 U.S. 544, 564-66 (1981).

aside reveals a somewhat atypical process, which explains both the backdrop of a current dispute between the Wisconsin local governments and the Oneidas and the local governments' interest in these proceedings.

In 1838 the Oneidas entered into a treaty with the United States pursuant to which they ceded all their title and interest in the land set apart for the New York Indians in Wisconsin. Treaty with the Oneida, February 3, 1838, 7 Stat. 566 (the "1838 Treaty"). The United States agreed to pay $33,500 for this express cession of land and to set aside from that cession "a tract of land containing one hundred (100) acres for each [Oneida] individual." Id. The total amount of land set apart pursuant

to the 1838 Treaty was approximately 65,650 acres.[2]

As early as the 1850s, the Oneidas began to petition the United States to allot their lands as, they believed, the United States had agreed to do in the 1838 Treaty. In so petitioning, the Oneidas expressed their desire to become citizens of the State of Wisconsin and subject to its laws.

In 1889, after the enactment of the General Allotment Act,[3] a majority of the adult Oneidas voted to accept allotment of the 1838 Treaty land. The United States consequently began the allotment process that year.

During the period 1889 through 1892, the United States allotted in severalty to

[2]The Oneidas contend that the 1838 Treaty created the "Oneida Indian Reservation."

[3]General Allotment Act of 1887, c. 119, 24 Stat. 388.

individual Oneidas virtually all of the 1838 Treaty land and allocated the remaining land for educational and religious use by missionaries. By 1893, the process of allotment of the land set aside under the 1838 Treaty had been completed and no surplus or tribal lands remained.[4]

During the post-allotment period, the Oneidas sought to establish municipal governments under the laws of the State of Wisconsin. Even before the completion of the allotment process, the Oneidas had applied for admission of their lands to Brown and Outagamie Counties as townships. As a result of these efforts, in 1903 the Wisconsin legislature authorized the

[4]E.g., New York Indians v. United States, 40 Ct. Cl. 448, 471 (1905); [1893] Ann. Rep. Comm'r Indian Affairs 610.

creation of the towns of Hobart and Oneida from the 1838 Treaty land.[5]

Following the passage of the Burke Act in 1906,[6] the vast majority of Oneida allottees received fee patents. By 1918, more than 1150 Oneida held fee patents for their land and only 35 allotments remained under federal trust. By 1934, only 21 allottees, all incompetent, had not received fee patents. Thus, by 1934 at the latest, virtually all of the 1838 Treaty land had been allotted, the trust period on those allotments had expired and fee patents had been issued.

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[5]1903 Wis. Laws c. 339.

[6]25 U.S.C. § 349, 34 Stat. 182 (1906). The Burke Act authorized the Secretary of the Interior to issue fee simple patents to competent Indian allottees. The authority of the Secretary to issue fee patents was affirmed and specifically applied to the Oneidas in a separate enactment later that same year. Act of June 21, 1906, 34 Stat. 325.

The composition of the land lying within the borders of the Wisconsin local governments is, therefore, a stark contrast to the respondent Yakima Indian Nation's reservation. Apparently, only four percent of the uninhabited "closed area"[7] and fifty percent of the "open area" is owned in fee simple on the Yakima Reservation.[8] Ninety-six percent of the land originally set apart for the Oneidas (63,899 acres) is today held in fee simple by non-members. The remaining four percent of the land originally reserved for the Oneidas (2751 acres now held in trust by the federal government) is interspersed among the

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[7]See Petitioner Brendale's Petition for Writ of Certiorari at p. 7.

[8]Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 530 (9th Cir. 1987).

parcels held in fee.[9] Accordingly, the land lies in the classic checkerboard pattern -- a pattern the Ninth Circuit found impedes the Yakima Tribe's ability to effectively engage in comprehensive land use planning unless it is permitted to regulate non-member fee land.[10]

The question of the ability of an Indian tribe to zone or otherwise regulate the conduct of non-members on fee land is of substantial importance to the Wisconsin local governments. They recently filed

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[9]Bureau of Indian Affairs, U.S. Dep't of the Interior, Lands Under Jurisdiction of Great Lakes Agency (March 1986). According to the figures of the last federal census, 1762 Oneida Indians reside on land set apart for the Oneidas in 1838, compared to 11,636 non-member residents. General Population Characteristics, United States Summary, 1980 Census of Population, Bureau of the Census, Source: United States Bureau of Indian Affairs. The Oneidas thus comprise only 13.2 percent of the population on the 1838 Treaty lands.

[10]See Confederated Tribes and Bands, 828 F.2d 529 at 534-35.

suit in the United States District Court for the Eastern District of Wisconsin seeking a declaration that any Oneida Indian Reservation which may have been established by the 1838 Treaty has been disestablished and that, accordingly, neither the Oneida Tribe of Indians of Wisconsin, nor its officials, has jurisdiction over fee-patented land within the exterior boundaries of the alleged original reservation.[11]

The Ninth Circuit's apparent reversal of the Montana presumption[12] would upset settled expectations of the residents of the Wisconsin local governments. The post-allotment history of the land originally reserved provides the basis for the

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[11]Brown-Outagamie-Oneida Jurisdiction Commission v. Purcell Powless, No. 85-C-1052 (E.D. Wis.).

[12]See text infra at 14.

residents' expectation that their conduct and land will be regulated by the Wisconsin local governments. For over fifty years those governments have exercised continuous regulatory authority over the alienated land of the Oneidas, which long ago lost any Indian character.[13]

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[13]After the allotment of virtually all of the land set apart pursuant to the 1838 Treaty and the Oneidas' acceptance of the local governments' regulatory authority, Wisconsin recognized a need for and became a pioneer in rural zoning. In 1923, the Wisconsin legislature became the first state body to authorize zoning outside the boundaries of incorporated municipalities. Solberg, Rural Zoning in the United States, Agriculture Information Bulletin No. 59, pp. 2, 6, 8, 13 (1952). The legislature passed enabling laws granting zoning power to both counties and towns. See Wis. Stat. §§ 59.97 (Counties), 60.61 (Towns), 61.35 (Villages), 62.23 (Cities) (1985-86). Since that time the Wisconsin local governments have exercised their police power, through the enactment of zoning ordinances, to protect the health, safety and welfare of their residents -- Oneida Indians and non-Indians alike -- while affording them the political protection of the elective process. See Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387-89 (1926).

Until recently the Oneida Indians not only fully acquiesced in this exercise of regulatory authority, but also held local government office. Last year, however, the Oneida Tribe announced its intent to develop a comprehensive set of environmental regulations to be implemented within the exterior boundaries of the alleged Oneida Indian Reservation. Affirmance of the Ninth Circuit's decision would further threaten the jurisdictional balance of the Oneidas and the Wisconsin local governments and defeat the expectations of thousands of residents who trust that the land they have owned for decades will be regulated by officials for whom they vote.

STATEMENT OF THE CASE

The Wisconsin local governments adopt the statement of the case in the brief on the merits filed by Stanley Wilkinson.

SUMMARY OF ARGUMENT

This Court has held that Indian tribes have been implicitly divested of their sovereignty to regulate non-member conduct on land owned in fee by non-members. Montana v. United States, 450 U.S. 544, 564-66 (1987). The United States Court of Appeals for the Ninth Circuit's decision, by disregarding factual findings of the trial court and ignoring the demographic history of the open lands, reversed that presumption and substituted a presumption that tribes may regulate non-member land to achieve "comprehensive" land use planning. Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, 828 F.2d

529 (9th Cir. 1987). As a consequence, the Ninth Circuit has unsettled the well-established expectations of non-members that their land will continue to be subject to state and local government regulation.

Moreover, the Ninth Circuit decision causes an illogical situation to arise. Because the Ninth Circuit sought secure uniform regulation of a checkerboard reservation as a goal, the likelihood that an Indian tribe can regulate non-member fee land may well increase as greater numbers of non-members own land within the boundaries of the reservation. This Court should reverse and reaffirm its holding in Montana that non-member conduct may be regulated only to protect tribal self-government and to control internal tribal relationships.

ARGUMENT

I. THE NINTH CIRCUIT REVERSED THE PRESUMPTION THAT INDIAN TRIBES HAVE BEEN IMPLICITLY DIVESTED OF THEIR SOVEREIGNTY TO REGULATE NON-MEMBER CONDUCT ON NON-MEMBER FEE LAND.

The Ninth Circuit held that the Yakima Indian Nation had the authority to zone non-member fee land because the lack of such regulation "would destroy" the Yakimas' ability to zone Indian-owned land. Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, 828 F.2d 529, 535 (9th Cir. 1987).[14] To reach this conclusion, the Ninth Circuit ignored factual findings made by the district court. The district court expressly found

[14]All of the land at issue was contained within the boundaries of the unquestioned, traditional Yakima Indian reservation. As described supra at page 3, the land reserved for the Oneidas was set apart in a less traditional manner, and the continued existence of any reservation is disputed. The Ninth Circuit did not purport to address such a non-traditional or disputed reservation.

that the evidence presented during trial did not support the Yakimas' argument that checkerboard zoning is either impossible or difficult to administer. Confederated Tribes and Bands of the Yakima Indian Nation v. County of Yakima, No. C-83-724-JLQ (D. Wash. May 24, 1984) (findings of fact and conclusions of law), appended to County of Yakima's Petition for a Writ of Certiorari at 50-A. The district court further found that:

> Of necessity, so-called checkerboard zoning is required in today's society, whether it be in the relations between counties and cities or towns, or between counties and Indian tribes.

Id. By ignoring such facts in reaching its conclusion, the Ninth Circuit appears to have established a legal presumption that tribes have the power to zone

"checkerboard" lands owned in fee by non-members.

Such a presumption is, however, contrary to the presumption established by this Court that tribes have been divested of the authority to regulate non-member conduct on non-member fee land. Montana v. United States, 450 U.S. 544, 564-65 (1981).[15] In Montana, this Court held that "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." Id. at 564; see also United States v. Wheeler, 435 U.S.

[15]The Wisconsin local governments do not express an opinion on the Ninth Circuit's decision to the extent that the court has relied upon any treaty rights specifically granted to the Yakima Indian Nation for its finding that the Yakimas possessed the authority to regulate land use.

313, 326 (1978) ("The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving the relations between an Indian tribe and non-members of the tribe."). The Ninth Circuit appears not to have required a demonstration that zoning of non-member fee land is necessary to protect tribal self-government or control internal relationships, but to have presumed the existence of the power, based upon the tribe's interest in regulating its own lands. 828 F.2d at 534 (quoting Segundo v. Rancho Mirage, 813 F.2d 1387, 1393 (9th Cir. 1987) and comparing the tribe to a local government). Such an analysis squarely conflicts with this Court's prior holding in Montana that only the demonstrated need for protection of tribal self-government or control of internal

relations warrants the exercise of tribal power over non-members. 450 U.S. at 564.

II. DE FACTO DIVESTITURE OF TRIBAL SOVEREIGNTY TO REGULATE NON-MEMBER CONDUCT ON FEE LAND PRESUMPTIVELY OCCURS WHEN RESERVATION LAND LOSES ITS INDIAN CHARACTER.

The Ninth Circuit's apparent suggestion that the more checkerboard a reservation, the more reason exists to grant a tribe authority to zone non-Indian fee land to assure "comprehensive planning [of tribal land], so fundamental to a zoning scheme"[16] is both contrary to logic and legally unsupportable. The broad and unacceptable ramifications of this argument are most evident when examined in the context of checkerboard reservation land that has lost its Indian character, such as the land set

[16] Confederated Tribes and Bands of the Yakima Indian Nation v. Whiteside, 828 F.2d 529, 535 (9th Cir. 1987).

apart for the Oneidas in the Treaty of 1838.

A. The Ninth Circuit's Analysis Produces Illogical Results.

The Ninth Circuit's reasoning leads to the illogical result that the presence of an increasing number of non-members (and thus a more checkerboard reservation) increases the likelihood that a tribe will regulate non-member land. The practical effect of the implementation of this reasoning on the non-Indian community would surely unsettle expectations built on years of Indian acquiescence to local government regulation. For example, after the allotment process the Oneidas participated in and benefited from the services and improvements of the state, county and municipal governments. As early as 1893, the Oneidas exercised their right to vote in local elections. In addition, the Oneidas requested, were employed during,

and benefited from the construction of roads, bridges, schools and other public works. Similarly, the Oneidas voluntarily subjected themselves to the jurisdiction of local law enforcement authorities and state and local courts for resolution of civil and criminal disputes.

Thus, with the full acquiescence of the Oneidas, state and local authorities exercised civil, criminal and regulatory jurisdiction over the land set apart pursuant to the 1838 Treaty. During this period, the United States did not recognize or treat the 1838 Treaty land as an Indian reservation or as otherwise exempt from state or local jurisdiction. In fact, on two occasions the District Court for the Eastern District of Wisconsin held that the original Oneida reservation had been disestablished or discontinued as a result of the allotment process. United States v. Hall, 171 F. 214 (E.D. Wis. 1909); Stevens

v. County of Brown, No. 3807 (E.D. Wis. Nov. 3, 1933).

Moreover, persons other than Oneidas now occupy the vast majority of the treaty land and that land has long since lost its Indian character. Instead, the land is now occupied by the homes, businesses, churches, and institutions of approximately 11,600 people who are not Oneidas.[17] The long-standing assumption of jurisdiction by state and local governments with the acknowledgment and acquiescence of the Oneidas and the United States has created justifiable expectations that that land will continue to be subject to state and local jurisdiction.

Logic would suggest that, on the facts recited above, an Indian group claiming the right to regulate non-member conduct on fee land would be required to surmount almost

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[17] See supra note 9.

insuperable presumptions. Instead, the Ninth Circuit suggests a presumption of tribal authority to regulate non-member conduct on fee land within checkerboard reservations. Paradoxically, the more a reservation loses its Indian character as a result of non-member settlement, the easier it becomes for a tribe to assert a right to regulate non-member land to achieve "comprehensive" land use planning.[18]

[18]Not only has the Ninth Circuit erred in reversing the presumption that a tribe has no inherent authority to regulate non-member fee land, but it has erred by creating an undefined "balance of interests" test to determine when the power it presumes to exist should be exercised. If this Court accepts the use of such a test, there must be specific limits to its application. For example, it would be inconsistent with the dependent sovereign status of an Indian tribe to permit it to extend its authority beyond what is essential for control of internal tribal matters. United States v. Wheeler, 435 U.S. 313 (1978). Accordingly, a court should balance only those tribal interests that are uniquely Indian interests against the conflicting interests of a local government.

B. The Ninth Circuit's Opinion Is Legally Unsupportable Because It Conflicts With This Court's Decision In Solem.

The scope of an Indian tribe's regulatory power over non-member fee land cannot be assessed without a corresponding inquiry into the current status of those formerly tribal lands. As stated by this Court in Montana:

> There is simply no suggestion in the legislative history [of the General Allotment Act] that Congress intended that the non-Indians who would settle upon alienated allotted lands would be subject to tribal regulatory authority. It defies common sense to suppose that Congress would intend that non-Indians purchasing allotted lands would become subject to tribal jurisdiction when an avowed purpose of the allotment policy was the ultimate destruction of tribal government.

450 U.S. 544, 559 (quoting United States v. Montana, 604 F.2d 1162 (9th Cir. 1979)).

The logic of this reasoning, missing from the Ninth Circuit's opinion, is supported by this Court's analysis in Solem v. Bartlett, 465 U.S. 463 (1984). In Solem, the Court stated that explicit language of cession or termination is not required for a finding of disestablishment. 465 U.S. at 471. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 588 n.4 (1977). Instead, the legislative history of the allotment process and surrounding circumstances can sufficiently evidence congressional intent to disestablish. See id. Specifically, this Court stated that:

> On a more pragmatic level, we have recognized that who actually moved onto opened reservation lands is also relevant to deciding whether a surplus land act diminished a reservation. Where non-Indian settlers flooded into the open portion of a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment, may have occurred. (Citations omitted.) In addition to

> the obvious practical advantages of acquiescing to de facto diminishment, we look to the subsequent demographic history of open lands as one additional clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers.

Solem, 465 U.S. at 471.[19]

This Court's recognition in Solem of the wisdom of looking to the subsequent demographic history of opened lands ought to apply with equal force to any determination of whether a tribe has been divested of its sovereignty to regulate non-member conduct on fee land. As the Court reasoned in Solem:

> When an area is predominately populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land

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[19] See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), in which this Court held that the circumstances surrounding the passage of the three Rosebud Acts unequivocally demonstrated that Congress intended each act to diminish the Rosebud Reservation.

> remains Indian country seriously burdens the administration of state and local governments.

465 U.S. at 472 n.12.

The Ninth Circuit erred by not scrutinizing the demographic history of the alienated lands, in particular the open area of the Yakima Indian Reservation. Adherence to Montana would have precluded that error.

CONCLUSION

For the reasons set forth above, amici curiae The City of Green Bay, Wisconsin, the towns of Hobart and Oneida, Wisconsin and the Wisconsin counties of Brown and Outagamie respectfully submit that the

judgment of the Court of Appeals for the Ninth Circuit must be reversed.

Respectfully submitted,

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